

JANE S. CLIFFORD)	
(Widow of FRANK L. CLIFFORD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
GENERAL DYNAMICS CORPORATION)	DATE ISSUED:
)	
and)	
)	
INSURANCE COMPANY OF)	
NORTH AMERICA/CIGNA)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Scott E. Richardson (Parker, Coulter, Daley & White), Boston, Massachusetts, for employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Employer appeals the Decision and Order and Decision on Motion for Reconsideration (88-

LHC-2565) of Administrative Law Judge David W. DiNardi awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Frank Clifford (decedent) worked for employer as a radiation control specialist from 1959 to 1970. Thereafter, he accepted employment selling radiation detection equipment and in 1972 he became a self-employed consultant in radiation control. In a Decision and Order issued in 1982, decedent was awarded benefits under the Act for permanent partial disability resulting from a respiratory impairment. 33 U.S.C. §908(c)(21). The administrative law judge found that his respiratory impairment was attributable to asbestosis. Cl. Ex. 4. Employer appealed the award to the Board, which remanded the case for the administrative law judge to recalculate decedent's average weekly wage pursuant to Section 10(i), 33 U.S.C. §910(i)(1988). *See Clifford v. General Dynamics Corp.*, BRB Nos. 82-1110/A (Feb. 21, 1986). The administrative law judge was therefore required to recalculate the extent of any loss of wage-earning capacity. On remand, the administrative law judge accepted the parties' stipulation to an average weekly wage of \$385.75 during the year prior to manifestation of decedent's respiratory impairment in 1980, and a resulting \$38.69 per week loss of wage-earning capacity. Employer was awarded Section 8(f) relief based on decedent's pre-existing chronic bronchitis. 33 U.S.C. §908(f); Cl. Ex. 3. On July 15, 1987, small cell carcinoma of the lung was diagnosed, which decedent's treating physician attributed to cigarette smoking and exposure to asbestos. On February 26, 1989, decedent died due to lung cancer, which metastasized to his bones and liver.

Claimant filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. Employer disputed claimant's entitlement to benefits. Alternatively, it contended that liability should be assumed by the Special Fund pursuant to Section 8(f), as it had already paid 104 weeks of compensation for decedent's disability, and it disputed the average weekly wage applicable to the award of death benefits.

The administrative law judge found that decedent's death was due to work-related lung cancer, which he determined was a new and distinct injury from decedent's pre-existing work-related asbestosis. The average weekly wage for determining claimant's death benefits was therefore calculated from decedent's earnings during 1987, when his lung cancer was first diagnosed, rather than his earnings prior to the manifestation of decedent's respiratory impairment. *See* 33 U.S.C. §910(i). The administrative law judge found that decedent had an average weekly wage of \$528.25 in 1987. Finally, employer was denied Section 8(f) relief. The administrative law judge reasoned that decedent's death was due solely to lung cancer and its metastasis. On reconsideration, the administrative law judge again denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's finding that decedent's lung cancer was a new injury, which was distinct from his pre-existing work-related asbestosis.

Employer argues that the decedent's lung cancer was due to the natural progression of his pre-existing asbestosis. Accordingly, employer contends that the administrative law judge erred by not calculating claimant's death benefits from decedent's average weekly wage in 1980. Employer also argues that the administrative law judge erred by not applying its prior award of Section 8(f) relief for decedent's asbestosis to limit its liability for claimant's award of death benefits. Claimant responds, urging affirmance of the administrative law judge's average weekly wage determination. The Director has not responded to this appeal.

We reject employer's argument that the administrative law judge erred by finding that decedent's lung cancer was a new and distinct injury from his pre-existing asbestosis. There is no medical evidence of record that decedent's lung cancer was due to the natural progression of the asbestosis. Although the record indicates that both decedent's asbestosis and lung cancer were due to asbestos exposure, there is no evidence of record that the cancer developed from decedent's asbestosis. Thus, decedent's lung cancer constitutes a new injury, *see generally* 33 U.S.C. §902(2), and average weekly wage must be calculated as of the time of this injury. *See* 33 U.S.C. §910(c), (i). Accordingly, we affirm the administrative law judge's award of death benefits based on decedent's average weekly wage prior to the manifestation of his lung cancer in 1987. *See generally* *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 148-150 (1991); *Lopez v. Southern Stevedores*, 23 BRBS 295, 299 (1990); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 n.3 (1989).

We also reject employer's argument that the administrative law judge erred by denying its application for Section 8(f) relief.¹ While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities and death arising out of the same injury, employer must separately establish the requisite elements for Section 8(f)

¹Section 8(f) relief is available in this case if employer establishes that decedent had a manifest pre-existing permanent partial disability which contributed to decedent's death. *See Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992).

relief on the claims for disability and death benefits.² See *Henry v. George Hyman Construction Co.*, 21 BRBS 329 (1988). Cf. *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT)(4th Cir. 1990)(where disabilities are due to two separate injuries, employer may be liable for two periods of 104 weeks). In this case, employer has failed to establish that Section 8(f) applies to the death claim. The record in this case is devoid of any evidence that decedent's pre-existing lung impairment contributed to his death, and the evidence establishes that decedent's lung cancer was the sole cause of death. See Cl. Ex. 6. As the administrative law judge's finding that lung cancer was the sole cause of death is supported by substantial evidence, we affirm the administrative law judge's denial of Section 8(f) relief in regard to the claim for death benefits, as the contribution element is not satisfied. See generally *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

²Employer contends that limiting its liability for both awards to one period of 104 weeks would be consistent with *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). We disagree. *Bingham* was decided pursuant to Section 9 as it existed prior to the 1984 Amendments to the Act, which permitted an award of death benefits if the employee was permanently totally disabled due to a work-related condition at the time of death. 33 U.S.C. §909(1982)(amended 1984). The Board stated that if death benefits were awarded for a non-work-related death under these circumstances, employer never could receive Section 8(f) relief on the death claim if it were required to separately prove the elements for Section 8(f) relief. On policy grounds, the Board held that Section 8(f) would not be separately applied to the disability and death claims and limited employer's liability to one period of 104 weeks. *Id.*, 20 BRBS at 204-205. The amended Section 9 requires that the work-related injury cause the employee's death, and it is applicable to this claim. Employer must, therefore, establish the elements of Section 8(f) relief with regard to both the disability and the death claims.